

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

GARY MERLINO CONSTRUCTION CO.

Employer/Petitioner

and

Case 19-UC-732

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 302, AFL-CIO

Union

REGIONAL DIRECTOR'S DECISION
AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record¹ in this proceeding, the undersigned makes the following findings and conclusions.²

I. SUMMARY

The Employer/Petitioner ("Employer") is a Washington State corporation primarily engaged in road and utility construction. Since 1967, the Employer has voluntarily recognized the Union as the exclusive collective-bargaining representative for its heavy equipment operators and has been signatory to successive collective-bargaining agreements negotiated by the Union and the Associated General Contractors ("AGC agreement"). In 1968, the Employer began operating a vehicle maintenance/mechanic shop in the South Park neighborhood in Seattle, Washington ("shop"). The Employer's shop employs approximately 23 employees, 19 of whom are at issue in the present case, including service mechanics, shop mechanics, welders - shop, welders - field, fueler/oiler - field, and sweeper mechanic (collectively referred to as "shop mechanics").³ Since the shop's inception, the shop mechanics have never been represented by a union. On June 17, 2005, the Union filed a grievance alleging that the Employer was failing to apply the parties' current AGC agreement to the Employer's mechanics, including the shop mechanics. Thereafter, the Employer filed the instant petition seeking to clarify that the shop mechanics are excluded from the existing bargaining unit. In response, the Union argues that I should dismiss the petition in light of the pending grievance arbitration or, absent dismissal, include the shop mechanics in the bargaining unit.

Based on a careful review of the record and the parties' respective briefs, I shall not dismiss the petition because it raises a question concerning representation within the exclusive

¹ The Employer/Petitioner and Union timely filed briefs, which were duly considered.

² The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

³ The parties stipulated, without providing a reason, that the following shop employees are properly excluded from any unit found appropriate: sweeper drivers, parts orderers, and yard laborers.

jurisdiction of the Board. Additionally, I shall grant the Employer's petition to exclude the shop mechanics from the existing unit based on their historical exclusion.

Below, I have set forth the record evidence concerning the Employer's operations and the shop mechanics. Following the presentation of the evidence, I have set forth a section applying the Board's legal standards to the evidence. The decision concludes with an order clarifying that the shop mechanics are excluded from the existing unit and with a section on the right to request review of this Decision and Order.

II. RECORD EVIDENCE

A. The Employer's Operations

The Employer is a general contractor, which does road and utility work and some general commercial work in western Washington. The Employer is headquartered in Seattle, Washington and works primarily in King, Pierce, and Snohomish counties. The Employer is owned and managed by Co-Presidents Gary and Don Merlino. The Employer also employs several additional managers, including Ralph Lopriore, Maintenance Shop Manager.

The Employer employs approximately 400 employees who work in various capacities and are represented by several different unions. Accordingly, the Employer is signatory to several "master" collective-bargaining agreements negotiated by the Associated General Contractors of Washington with the Cement Masons, Teamsters, Carpenters and Laborers. Additionally, at the time of the hearing, the Employer was working at the Seattle-Tacoma International Airport ("SeaTac"), which is covered by a Project Labor Agreement involving various trade unions and contractors at the SeaTac jobsite.

Since 1967, the Employer has recognized the Union as the exclusive bargaining representative for its machine operators. Since that date, the Employer has been a signatory to successive AGC agreements negotiated between the Associated General Contractors and the Union. There is no dispute that the Union represents the Employer's dozer operators, excavator operators, loader operators, backhoe operators, trimmer operators, paving machine operators and slip form paving mechanics. In addition to these job classifications, all the parties' AGC agreements covering the period from 1967 to the present provide for various other job classifications, including mechanics.⁴

In 1968, the Employer began operating the shop to perform vehicle maintenance. The shop is currently supervised by Ralph Lopriore and employs approximately 19 mechanics who are at issue in the present case, including 4 service mechanics (2 field, 2 shop), 6 shop mechanics, 3 welders - shop, 2 welders - field, 3 fueler/oiler - field, and 1 sweeper mechanic. All the shop mechanics who report to Lopriore are responsible for the Employer's heavy equipment repair and maintenance. The "field" shop mechanics work at the Employer's various worksites but are in regular communication with Lopriore via two-way radios. If there is insufficient work in the field, the "field" shop mechanics work in the shop with the other shop mechanics. The Union represented operators do not work in the shop and do not report to Lopriore. Additionally, Don Merlino testified that the shop mechanics do not operate equipment. The shop mechanics are also covered by the Employer's unique wage scale and benefits.

Since the shop's inception, the shop mechanics have never been represented by the Union. However, the record demonstrates that there were Union attempts to organize the shop

⁴ Don Merlino testified that the CBAs also contain several job classifications that are not employed by the Employer, such as crane operators, derrick operators, transporters, mucking machine operators, and drilling machine operators.

mechanics in approximately 1994 and 1997. Neither effort resulted in a Board election. Nevertheless, on June 17, 2005, the Union filed a grievance alleging that the Employer was violating the parties' current AGC agreement by failing to apply that agreement to the Employer's mechanics, including the shop mechanics. On July 27, 2005, the Union and the Employer met to try and resolve the grievance at the Employer's headquarters but were unsuccessful. On July 28, 2005, the Union sent a letter to the Employer stating that it would proceed to arbitration on the grievance as provided in the AGC agreement. As of the date of the hearing, the arbitration had not occurred.

In support of its position, the Union asserts that the Employer has recognized the Union as the exclusive collective-bargaining representative for its mechanics. Specifically, the Union relies heavily on what it contends is longstanding unit description language in a succession of AGC agreements. Additionally, the Union emphasizes that the Employer employs four Union represented mechanics.

During the hearing, the Employer admitted that it employs two Union mechanics who work at the SeaTac jobsite under the Project Labor Agreement and two Union mechanics who work on the Employer's paving crew.⁵ The two mechanics who work on the Employer's paving crew were formally employed by Dave Zulauga Construction and were represented by the Union. In 2001, the Employer acquired Zulauga Construction and hired the two mechanics and recognized the Union as their representative. There is no evidence of interaction, contact, and/or exchange between the four Union represented mechanics and the shop mechanics. Moreover, none of the four Union represented mechanics work at the Employer's shop or report to Lopriore.

Also in support of its argument, the Union relies on its dispatch hall records. According to Union dispatch hall records, the Employer has been dispatched seven Union mechanics (including oilers and welders) between March 22, 2001 and the date of the hearing. According to the record and the un rebutted testimony of Lopriore, five of these mechanics were dispatched to the Employer's SeaTac jobsite and were covered by the Project Labor Agreement. Additionally, Lopriore testified that another is employed at a different Employer, Stoneway Concrete, and that the remaining person was not a mechanic, but rather performed work as a pipe layer/lead pipe layer.

III. ANALYSIS

A. The Grievance

Initially, the Union asserts that the petition should be dismissed in light of the Union's pending arbitration. The Employer counters that dismissal is inappropriate under the Board's decision in *Ziegler, Inc.*, 333 NLRB 949 (2001). There, the Union filed a grievance alleging that the employer failed to apply the terms of collective-bargaining agreement to a historically excluded group of employees. The Employer then filed a unit clarification petition requesting that the Board exclude that group of employees from the existing unit. Initially, the Board, relying on *Bethlehem Steel Corp.*, 329 NLRB 243 (1999), noted that processing a unit clarification petition is normally inappropriate when the classification sought to be clarified has been traditionally excluded from the unit. However, the Board noted an exception to this general rule where the parties had arbitrated the disputed classification and the arbitrator had entered an award contrary to Board policy. See *Williams Transportation Co.*, 233 NLRB 837 (1977). Thus, the Board concluded that it would process a petition for unit clarification when

⁵ The two mechanics on the paving crew are responsible for maintaining and/or operating the Employer's trimmer and slip form paver. These mechanics work at the Employer's paving shop located in Renton, Washington, a different location from the shop at issue here.

there is a pending grievance/arbitration (such as here) because such proceedings “ultimately could result in an incongruous arbitration award.” *Ziegler*, 333 NLRB at 950.

The Union attempts to distinguish *Ziegler* and relies on the Board's decision in *Verizon Information Systems*, 335 NLRB 558 (2001) and my own decision in *Fred Meyer, Inc.* 19-UC-719 (October 22, 2003). In *Verizon*, the parties had entered into a neutrality agreement, which encompassed the resolution of disputes over the scope of the bargaining unit. In light of this agreement, the Board found dismissal of a unit clarification petition appropriate because the union had invoked the agreement and the Board favors such voluntary agreements reached between the parties, even though the agreement involved matters of union representation. In *Fred Meyer*, the union represented two separate units of employees with the same employer. The union sought to include a new classification of employees in one unit, while the employer preferred the other unit. The union subsequently filed a grievance and the employer filed a unit clarification petition. The Board, in agreement with me, found that the processing of the grievance was appropriate, but that the unit clarification petition should be held in abeyance pending the outcome of the grievance.⁶

Both *Verizon* and *Fred Meyer* are distinguishable from the present case. In the present case, there is no evidence that the Union and the Employer have entered into a neutrality agreement or an agreement to specifically resolve disputes concerning the scope of the bargaining unit similar to the agreement that was central to the Board's decision in *Verizon*. Unlike the situation in *Fred Meyer*, the Union here has not filed the present grievance seeking to determine in which of two bargaining units the unrepresented job classification belongs; rather, it is seeking to include a historically excluded group in its currently existing bargaining unit. In short, the instant case does not raise a contractual issue. Rather, the inclusion or exclusion of the shop mechanics in the existing bargaining unit is a representational issue within the exclusive jurisdiction of the Board. Accordingly, I find that the unit clarification petition is properly before me and shall not be dismissed.

B. The Shop Mechanics

The Board has held that it is inappropriate to clarify or accrete a historically excluded group of employees or job classifications into an existing unit absent a change in circumstances. *Williams Transportation Co.*, 233 NLRB 837 (1977). See also *Tarmac America Inc.*, 342 NLRB No. 107, fn 11 (“It is well-established that, where the parties to a bargaining relationship have historically excluded a group of employees from an established bargaining unit, even by mistake, the Board will not clarify the unit to include those employees unless substantial changes have occurred creating a real doubt whether the excluded employees should now be included in the unit.”). In the present case, the evidence unequivocally establishes that the Union has never represented the shop mechanic employees during its 37-year existence. Indeed, in its entire 37-year history, there is no evidence that the Employer has applied the AGC agreement to these employees or that the Union has filed previous grievances concerning the application of the AGC agreement to the shop mechanics, other than the June 17, 2005 grievance. Rather, the evidence demonstrates that on at least two prior occasions the Union has unsuccessfully attempted to organize the shop mechanics. Although the Union questions the relevance of the organizational attempts, it does not dispute that they took place. Additionally, the Board in *Ziegler* found prior dealings of the parties concerning the disputed classifications to be relevant to its decision. 333 NLRB at 905.

⁶ In the present case, neither party has requested that I hold the petition in abeyance pending the outcome of the grievance. However, even if a party had made such a request, I would find holding the petition in abeyance inappropriate for the same reason that dismissal is inappropriate.

Moreover, the evidence demonstrates that although the Employer has hired other Union mechanics, there is no evidence that a Union mechanic has worked at the shop or reported to Lopriore. Indeed, the Union mechanics who work at the SeaTac jobsite are covered by a different collective-bargaining agreement, the Project Labor Agreement. Additionally, the two Union mechanics who work on the Employer's paving crew were historically represented by the Union prior to the Employer's purchase of that operation in 2001. Accordingly, I find that the shop mechanics are excluded from the existing unit.

IV. CONCLUSION

Based on the foregoing facts, analysis and the record as a whole, I shall grant Employer's petition to clarify the unit and exclude the shop mechanics from the unit currently represented by Union.

V. ORDER

The shop mechanics, including the service mechanics, shop mechanics, welder - shop, welder - field, fuelers/oilers - field, sweeper mechanics, sweeper mechanics, sweeper drivers, parts orderers, and yard laborers, are excluded from the Employer's existing unit of employees represented the Union.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, D.C. by **5 p.m., EDST on September 30, 2005**. The request may **not** be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

DATED at Seattle, Washington this 16th day of September 2005.

/s/ [Richard L. Ahearn]

Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174